No. 95-537 (2)

Supreme Court, U.S.
FILED
NOV 1 1995
OFFICE OF THE CLERK

In The

Supreme Court of The United States

October Term, 1995

RICHARD L. GIAMPA,

Petitioner,

- vs.-

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GARY L. CASELLA
Chief Counsel
Grievance Committee for the Ninth Judicial District
399 Knollwood Road
White Plains, New York 10603
(914) 949-4540
Attorney for Respondent

On the Brief:
Faith Lorenzo

Appeal Press (914) 761-3600 (212) 267-6602 (516) 872-1110 (3923)

BEST AVAILABLE COPY

28 pgs

QUESTIONS PRESENTED

1. Is the due process clause violated when an attorney, after a disciplinary proceeding, is suspended for professional misconduct premised on four separate summary contempt adjudications, as well as his unethical actions in a fifth trial, and was collaterally estopped from re-litigating the merits of the underlying contempt adjucations at the disciplinary proceeding?

2. Is the equal protection clause violated when two of four existing New York State Appellate Courts have categorized criminal contempt as a serious crime and the other two Appellate Divisions have neither specifically designated criminal contempt to be a serious crime in their court rules nor have had the opportunity to decide whether criminal contempt would be considered a serious crime?

3. Are an attorney's contemptuous comments protected by the First Amendment?

TABLE OF CONTENTS

Page

Questions Presented 1

Table of Contents 2

Table of Authorities 3

Preliminary Statement 6

Statement of Jurisdiction 6

Statement of the Case 6

Reasons for Denying the Writ 9

I. Jurisdiction of Writ of Certiorari is Not Warranted in this Matter 9

II. Petitioner Has Been Afforded Due Process 10

III. The Equal Protection Clause Has Not Been Violated 18

IV. An Attorney's Contemptuous Statements Are Not Constitutionally Protected 20

Conclusion 22

TABLE OF AUTHORITIES

Page

Cases:

Bloom v. Illinois, 391 U.S. 194, (1968) 14

Ex parte Terry, 128 U.S. 289, (1988) 14

Giampa v Sheindlin, 177 A.D.2d 1066 (1st. Dept. 1991), lv den 79 N.Y.2d 754 (1992) 12

Giampa v. Snyder, 199 A.D.2d 1094, (1st. Dept. 1993), lv. Den 83 N.Y.2d 761 (1994) . 12

In re Isserman, 9 N.J. 269, (1952) 17

In. re Ruffalo, 390 U.S. 544 (1968) 11

In re Sawyer, 360 U.S. 622, (1959) 20

International Union, United Mine Workers of America v. Bagwell, 114 S.Ct. 2552 (1994) 14

Javits v. Stevens, 382 F. Supp. 131, (S.D.N.Y. 1978) 18

Kremer v. Chemical Construction Corp., 456 U.S. 461, (1992) 13

Matter of Giampa, 211 A.D.2d 212, (2nd Dept. 1995) 6,8

Matter of Stone, 174 A.D.2d 1,
(4th. Dept. 1991) 19

Matter of Leeds, 87 A.D.2d 96,
(2nd Dept. 1982) 15

Matter of Levy, 37 N.Y.2d 279, (1975) 8

Matter of Werlin, 170 A.D.2d 77
(2nd Dept. 1991) 15

Mildner v. Gulotta, 405 F. Supp. 182,
(E.D.N.Y. 1975),
Aff'd 425 U.S. 901 (1975) 11,18

Rodreguez v. Feinberg, 40 N.Y.2d 994 (1976) . . 12

Ryan v. New York Tel. Co.,
62 N.Y.2d 494, (1984) 13

Sacher v. United States, 343 U.S. 1, (1952) . . . 21

Singer v. Groh, 99 A.D.2d 758,
(2nd Dept. 1984) 12

United States v. Lumumba, 794 F.2d 806,
(2nd Cir. 1986) 17

Statutes, Rules and Regulations:

CPLR § 7801 12

CPLR § 7804(h) 12

DR 1-102(A)(5) 7

DR 1-102(A)(7), (Now DR 1-102[A][8] 7

22 NYCRR 1200.3 7

22 NYCRR 691.7(b) 7

22 NYCRR 701.2 12

Judiciary Law § 90(2) 19

Judiciary Law § 90(4)(d) 19

Judiciary Law § 751 1

Judiciary Law § 750 17

Judiciary Law § 755 14

Rule 42(a) Federal Rules of Criminal Procedure . 14

Rule 10, U.S. Supreme Court Rules 9

PRELIMINARY STATEMENT

This brief is submitted in opposition to the petitioner's application for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated May 22, 1995 which sustained ten charges of professional misconduct and suspended the petitioner for one year. *Matter of Giampa*, 211 A.D.2d 212, (2d Dept. 1995). The Court of Appeals of the State of New York, by order dated June 29, 1995 dismissed petitioner's appeal as of right, upon the ground that the appeal presented no substantial constitutional question directly involved, and denied petitioner's alternative motion for leave to appeal. *Matter of Giampa*, No. 809 (Ct. App. June 29, 1995).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C Section 1257(a).

STATEMENT OF THE CASE

Ten charges alleging violations of various sections of the Code of Professional Responsibility were brought against petitioner. The charges were based upon four adjudications of summary criminal contempt, each an unclassified misdemeanor, as well as petitioner's unethical actions in a fifth matter. Punishment for one of the four adjudications was expunged.

The order of the New York State Appellate Division, Second Judicial Department dated May 22, 1995 does not touch upon the construction of either the New York or the United States Constitution. Rather, the Appellate Division merely found that the evidence presented at the disciplinary proceeding sustained the charges that petitioner had engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5) of the New York Code of Professional Responsibility and conduct that reflected adversely on his fitness to practice law in violation of DR 1-102(A)(7) (now DR 1-102[A][8])(see 22 NYCRR 1200.3). In addition, the Appellate Division found that there was evidence to sustain the charges that petitioner was convicted of a serious crime within the meaning of 22 NYCRR 691.7(b).

Petitioner repeatedly engaged in willful, unlawful and contumacious behavior in the presence of the courts. The following statements represent examples of petitioner's conduct which lead to his contempt convictions. Petitioner was held in contempt by Acting Supreme Court Justice Sheindlin after consistently making sarcastic and derogatory remarks to the court such as:

> "I'm not infallible like your Honor;" "[T]he difference [between you and I] is Your Honor is not aware that he makes errors;" "Obviously the law is foreign to Your Honor in many respects." Petitioner accused the Judge of being a "wild lunatic," and stated to the Judge "your statement is an absolute lie." Petitioner also informed the bench that the Court's manner of conducting voir dire was "offensive," that a Court ruling was "unbecoming" and that the "Judicial Code also deals with judges."

Petitioner referred to New York State Supreme Court

Justice Covington as pompous, egotistical and lacking in legal ability. Petitioner further called the Court racist, and stated "You must be kidding," on several occasions. Petitioner accused Supreme Court Justice Leahy of being biased, making up facts, making a bogus decision, of living in a fantasy world and prosecuting the case more vigorously than the prosecutor.

Despite petitioner's contention to the contrary (Petitioner's Brief at 22), his disciplinary proceding was not a summary disciplinary proceeding. There were seven days of hearings at the disciplinary proceeding, amounting to five-hundred and eighty transcript pages in which petitioner was afforded the opportunity to be represented by counsel, and indeed had able counsel, and did testify and call witnesses on his behalf. Petitioner was properly collaterly estopped from relitigating the issue of his guilt, but he was permitted to produce evidence of the circumstances surrounding the contempt matters in explanation and mitigation. See *Matter of Levy*, 37 N.Y.2d 279 (1975). The exhibits received in evidence at the hearing included transcripts of the underlying trials where the misconduct occurred. In suspending petitioner, the Appellate Division, which had the benefit of the entire record to review, sustained all ten charges.

Thereafter, petitioner timely filed a notice of appeal and a motion for leave to appeal to the New York State Court of Appeals as well as an application for a stay in this matter. By order dated June 29, 1995, the New York State Court of Appeals denied all of petitioner's applications. *Matter of Giampa*, No. 809 (Ct. App. June 29, 1995).

REASONS FOR DENYING THE WRIT

I.

Jurisdiction on Writ of Certiorari is Not Warranted in this Matter.

Rule 10 of the United States Supreme Court Rules is entitled "Considerations Governing Review on Certiorari. The Rule states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's descretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States

court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Although Rule 10 is not exhaustive, the facts of the instant matter do not relate to the "character of reasons" that his Court will consider for a petition for a writ of certiorari. The issues involved in this case do not reach the constitiutional dimensions to be addressed by the United States Supreme Court. Instead, petitioner is couching his argument in constitutional due process language, when, in effect, he is arguing that the Special Referee below erred by precluding petitioner from relitigation the underlying contempt adjudications. The Appellate Division, Second Department correctly determined that the claims raised by petititoner were meritless, and the New York State Court of Appeals in it's decision denying appeal as of right, stated that "no substantial constitutional question is directly involved". Because the decision is founded on well-established legal precedent, and since none of the arguments advanced by petitioner involve important questions of federal law that have not been, but should be, settled by this Court, further consideration of petitioner's claims by this Court is not warranted.

II.

Petitioner Has Been Afforded Due Process.

The question that must be asked is whether petitioner

was afforded due process both at the disciplinary proceeding and when he was summarily held in contempt. The answer is that petitioner was afforded due process in both instances.

An attorney who is the subject of a disciplinary proceeding which could potentially lead to his disbarment is entitled to procedural due process, including a fair notice of the charges and an opportunity to be heard. *In re Ruffalo*, 390 U.S. 544 (1968). It is well-settled that New York's statutory scheme concerning attorney disciplinary matters fully comports with federal constitutional guarantees of procedural due process. *Mildner v. Gulotta*, 405 F.Supp. 182 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1975).

In the case at bar, petitioner had fair notice of the charges. He was served with a petition and supplemental petition containing ten separate charges of professional misconduct. The issues raised by the petition and answer were then referred by the Appellate Division, Second Judicial Department to a Special Referee "to hear and to report, together with his findings upon each of the issues."

Thereafter, petitioner, who was represented by counsel, was afforded a full evidentiary hearing and had the opportunity to produce witnesses and introduce documents into evidence on his own behalf. After the Referee rendered his Report, both sides submitted motions to the Appellate Division, Second Judicial Department which determined that the charges had been sustained. Thus, petitioner received his federal constitutional guarantees of procedural due process.

Likewise, petitioner's due process rights were not violated when he was summarily held in criminal contempt of court. First, in each instance in which respondent was held in contempt, he was warned by the courts that his conduct was improper, and he was given an opportunity to

make a statement in his defense or in extenuation of his conduct. See 22 N.Y.C.R.R. 701.2. Second, petitioner had the opportunity to appeal the court's ruling via a C.P.L.R. Article 78 proceeding. See C.P.L.R. 7801; Judiciary Law §755. Article 78 provides for a review of the record of the contempt proceeding, and provides an opportunity to supplement the record if necessary. C.P.L.R. §7804(h) even provides for the initiation of a full trial in certain circumstances. Petitioner obviously was aware of his opportunity to relitigate the merits of the contempt finding through an Article 78 proceeding as he sought to avail himself of this opportunity on two occassions. See *Giampa v. Sheindlin*, 177 A.D.2d 1066 (1st Dept. 1991) *lv denied* 79 N.Y.2d 754 (1992); *Giampa v. Snyder*, 199 A.D.2d 1094 (1st Dep't 1993) *lv denied* 83 N.Y.2d 761 (1994).[1] Whether or not petitioner availed himself of the full procedures provided by state law is irrelevant and does not constitute a sign of their inadequacy. Given both the in-court and subsequent opportunity to develop a factual record through the Article 78 proceeding, petitioner certainly had a full and fair opportunity to be heard. Thus, the Special Referee did not err by invoking the doctrine of collateral estoppel at the disciplinary hearing.

The gravamen of petitioner's argument is that because the Special Referee collaterally estopped petitioner from relitigating the merits of the underlying contempt adjudications at the disciplinary proceeding, he was denied due process. However, the Special Referee did not err by invoking the doctrine of collateral estoppel at the hearing,

---

[1] New York Courts have clearly demonstrated a willingness to reverse findings of contempt where the contemnor was not given an opportunity to be heard. See, *Rodrequez v. Feinberg*, 40 N.Y.2d 994 (19 76); *Singer v. Groh*, 99 A.D.2d 758 (2nd Dept. 1984).

when there was an identity of issues, and a full and fair opportunity to contest the decision now said to be controlling. See *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883 (1992); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494 (1984). Indeed, the New York Court of Appeals held in the case of *Matter of Levy*, supra, that in a disciplinary proceeding based upon a conviction of a crime by an attorney, the attorney may not relitigate the issue of his guilt of the crime but may introduce competent evidence to explain or mitigate the significance of his criminal conviction. Accordingly, the Special Referee in this case properly allowed petitioner to introduce evidence of the circumstances surrounding the contempt matters in explanation and mitigation.

Petitioner distinguishes summary contempt adjudications from other criminal adjudications based on the fact "the lawyer in the summary contempt situation has not been accorded the due process protection afforded in the context of the usual criminal charge resulting in a criminal conviction." Petitioner concludes that "due process protections are entirely absent from a 'serious crime' disciplinary proceeding premised on a summary adjudication" (Petitioner's Brief at 25).

Admittedly, there are differences between summary contempt proceedings and other criminal proceedings. However, it does not follow that summary contempt adjudications deprive an attorney of the due process upon which to base a disciplinary proceeding for a serious crime.

One major difference between the summary contempt proceedings in this case and other criminal proceedings is that the misconduct which was the basis for petitioner's contempt convictions, occured in the direct presence of the Court. This Court has long recognized that direct contempts

that occur in the court's presence may be immediately adjudged and sanctioned summarily. In *Ex parte Terry*, 128 U.S. 289, 312, 9 S.Ct. 77, 32 L.Ed. 405 (1888), Justice Harlan, in his opinion, stated that where:

> The judicial eye witnessed the act, and the judicial mind comprehended all the circumstances of aggravation, provocation or mitigation; and, the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment.

This remains the general rule today. See, International Union, United Mine Workers of America v. Bagwell, 114 S.Ct. 2552 (1994). Furthermore, Rule 42 (a) of the Federal Rules of Criminal Procedure provide that "criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was commited in the actual presence of the court. Similarly, New York Judiciary Law §755 reqires that summary punishment may be invoked only "[w]here the offense is commited in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing..." When the judge's findings are coupled with the petitioner's opportunity to make a statement in court in his defense and his opportunity to appeal the judge's findings, it is clear that petitioner was given a full and fair opportunity to litigate the issue of his contempt.

Petitoner erroneously relies upon an exception that has been carved out of this general rule for serious criminal contempts in which a jury trial is required. See, *Bloom v. Illinois*, 391 U.S. 194, 209-210 (1968). In *Bloom*, this Court noted that many contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution. The *Bloom* Court further stated that "when

serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution...". The *Bloom* Court reiterated the long standing principle that petty offenses need not be tried by a jury. In determining whether a criminal contempt falls within the category of petty offense or serious crime, the *Bloom* Court looked at the prescribed penalty imposed "as the best evidence of the seriousness of the offense." Id. at 209.

In support of his claim that criminal contempt should not be considered a serious crime, petitioner cites *Bloom v. Illinois*, supra. The *Bloom* Court noted that many criminal contempt convictions are petty offenses. Thus, petitioner takes issue with the fact that the New York courts have determined that an adjudication of summary criminal contempt constitutes a "serious crime" as defined by 22 N.Y.C.R.R. 691.7(b) See, *Matter of Leeds*, 87 A.D.2d 96 (2nd Dep't 1982); *Matter of Werlin*, 170 A.D.2d 77 (2nd Dep't 1991). Unlike the *Bloom* court which looked at the prescribed punishment to determine if a criminal contempt conviction is a serious crime which would require a trial by jury, New York Courts in the case at bar looked at the nature of the crime when determining whether a crime is considered a serious crime for the purposes of conducting a disciplinary proceeding. 22 N.Y.C.R.R. 691.7 states:

> (a) Upon the filing with this court of a certificate that an attorney has been convicted of a serious crime as hereinafter defined in a court of record of any State, territory or district, including this State, this court shall cause formal charges to be made and served upon the respondent and shall enter an order immediately referring the matter to a referee, justice or judge appointed by this court to conduct forthwith

> disciplinary proceedings, whether the conviction resulted from a plea of guilty or nolo contendre or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.
>
> (b) The term "serious crime" shall include any felony, not resulting in automatic disbarment under the provisions of subdivision (4) of section 90 of the Judiciary Law, and any lesser crime a necessary element of which, as detemined by the statutory or common law definition of such crime, involves interference with the administration of justice, criminal contempt of court, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, an attempt or a conspiracy or solicitation of another to commit a "serious crime" or a crime involving moral turpitude.
>
> (c) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him based on the conviction, and the attorney may not offer evidence inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

Petitioner's argument intertwines and confuses the purpose of the separate and distinct definitions of serious crime and petty offense referred to in *Bloom* and in 22

N.Y.C.R.R. 691.7. In *Bloom* the Court was reviewing a contempt proceeding which is designed to "vindicate the authority of the court" See, *In re Isserman*, 9 N.J. 269 (1952). In this forum and for this purpose, the Court looked at the punishment prescribed to determine if a contempt adjudication is a serious crime. The applicable rule, 22 N.Y.C.R.R. 691.7, is designed to provide a proceeding to "deal with the fitness of the court's officer to continue in that office". For this purpose and in the disciplinary proceeeding forum the punishment prescribed is not a controlling factor in determining whether contempt is a serious crime.

Thus, when a judge summarily holds an attorney in criminal contempt without imposing a sentence in excess of a petty offense, a "full-blown trial" is unnecessary to preserve the attorney's right to due process. See, e.g. *United States v. Lumumba*, 794 F.2d 806, 814 (2nd Cir. 1986). In the case at bar, petitioner was not entitled to a full blown trial as summary adjudications of criminal contempt of court pursuant to Judiciary Law, Section 750, are punishable by a fine, not exceeding one thousand dollars, or by imprisonment, not exceeding thirty days (Judiciary Law, Section 751). For this reason, petitioner is incorrect in asserting that such proceedings give judges 'the unconstitutionally awesome power to strip an attorney of the right to practice whenever courtroom advocacy and conflict results in a summary contempt adjudication" (Petitioner's Brief at 21). The judges who held the petitioner in contempt were limited to the sanctions prescribed by Judiciary Law §750 and did not have the power to strip the petitioner of his license. Rather, petitioner was suspended by the justices of the Appellate Division, Second Department, a separate body, after being given the opportunity to be heard. It should be noted that the findings of the Special Referee are in no way binding on the Appellate Division, and the Appellate Division is under no obligation to suspend or disbar an

attorney who has been found guilty of contempt of court. Thus, the power and decision to discipline an attorney is greatly removed from the trial judge's authority.

In summary, petitioner's due process rights were not violated at either the contempt proceeding or at the disciplinary proceeding. Petitioner was given a full and fair opportunity to litigate his contempt and therefore, the Special Referee properly invoked the doctrine of collateral estoppel at the disciplinary hearing. To allow petitioner to relitigate the merits of his summary contempt adjudication at the disciplinary proceeding would undermine the doctrine of collateral estoppel and this cannot be tolerated.

III.

The Equal Protection Clause Has Not Been Violated.

Petitioner erroneously argues that his constitutional rights to due process and equal protection under the law have been violated because the rules of the Appellate Divisions for the Third and Fourth Judicial Departments of the State of New York do not specifically designate criminal contempt as a "serious crime", whereas the Appellate Divisions for the First and Second Judicial Departments have included criminal contempt of court in the category of serious crime.

It has been recognized that a special relationship exists between the attorney and the court which grants him a license to practice law before it. See, *Javits v. Stevens* , 382 F.Supp. 131 (S.D.N.Y. 1978); *Mildner v. Gulotta*, supra. These Courts further recognized that "no other body is as well qualified or as interested in determining whether an attorney is qualified to practice law." *Javits v. Stevens*, supra, 382 F. Supp. at 141.

Apparently, the legislature recognized the individual and special relationship which exists between attorneys and the courts in which they practice, as the legislature placed the responsibility for the discipline of attorneys and review of disciplinary proceedings in the hands of the courts. See Judiciary Law §90 (2). In giving the individual Departments the authority to discipline attorneys within their jurisdiction, the legislature seemingly recognized that reasons of policy regarded as significant in one Department in their effect on the conduct of attorneys may not prevail in another Department, because of differing conditions. Because the individual departments and individual courts may have different needs, the rules governing the conduct of attorneys licensed to practice law before those courts may vary.

Furthermore, simply because the Third and Fourth Departments do not specifically include contempt within the definition of "serious crime" does not mean that those Departments would not find criminal contempt to be within the meaning of "serious crime." The Judiciary Law § 90 (4)(d) and the Rules of the Third and Fourth Department include within the category of serious crime "any other crime a necessary element of which as determined by statutory or common law definition of such crime, includes interference with the adminstration of justice". Certainly, criminal contempt is a crime which interferes with the adminstration of justice. However, as petitioner notes (Petitioner's Brief at 32), "research has not disclosed any published disciplinary Third or Fourth Department decisions based on summary contempt adjudication 'serious crime' charges."[2]

---

[2] Respondent's research disclosed only one case from the Fourth Department, *Matter of Stone*, 174 A.D.2d 1 (4th Dept. 1991) in which an attorney was suspended from the practice of law in New York based upon his consent to disbarment in Arizona. Harry Stone faced charges of contempt of court and other unprofessional conduct in Arizona. He

In any event, petitioner was held in contempt in the First and Second Departments and was admitted to practice law in the State of New York by the Appellate Division, Second Department. Both the First and Second Department Rules include criminal contempt in the category of serious crime. The Rules of all four Departments are published and promulgated, thus, putting petitioner on notice that he is required to follow the rules of the court in which he is practicing.

IV.

An Attorney's Contemptuous Statements Are Not Constitutionally Protected

As a member of a regulated profession and as an officer of the court, petitioner relinquished certain first amendment rights. As Justice Stewart noted in his concurring opinion in *In re Sawyer*, 360 U.S. 622, 646 (1959):

> A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.

---

waived a hearing in New York and presented only a petition in mitigation. The Fourth Department did not state whether or not the contempt of court was a serious crime when they suspended Harry Stone.

Certainly, petitioner had the right to argue vigorously for his clients. However, in making those arguments on behalf of his clients petitioner did not have the right to make the clearly contemptuous comments he made to the court during trial. As Justice Jackson stated in *Sacher v. United States*, 343 U.S. 1, 9 (1952):

> Of course, it is the right for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge--his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation.

In the five trials which were the basis for petitioner's disciplinary proceeding, petitioner could not abide by the orders of the courts and did not limit his speech. Petitioner cannot "invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct..." *In re Sawyer*, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY L. CASELLA
Attorney for Respondent
Grievance Committee for
the Ninth Judicial District

FAITH LORENZO
Of Counsel